

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

VALICOFF FRUIT CO., INC., a)	
Washington corporation,)	NO. CV-13-3057-LRS
)	
Plaintiff,)	ORDER RE DEFENDANT'S
)	MOTION FOR PROTECTIVE
-vs-)	ORDER
)	
TUFF AUTOMATION, INC., a)	
Michigan corporation,)	
)	
Defendant.)	
)	

BEFORE THE COURT is Defendant Tuff Automation Inc.'s Motion For Protective Order (ECF No. 17). This motion was heard with oral argument on November 26, 2014.

I. BACKGROUND

Plaintiff is a Washington corporation involved in, among other things, the business of storing fresh fruit for ultimate sale to domestic and/or foreign markets. Defendant is a Michigan corporation involved, in the design, manufacture,

1 sale and installation of equipment used to create and maintain
2 "controlled atmosphere" (or "CA") regimes in warehouses for
3 the purpose of prolonging the storage life of fresh fruit.
4 This action was filed on May 29, 2013. (ECF No. 1).
5 Plaintiff's suit arises out of Plaintiff's purchase from
6 Defendant of CA equipment and controllers for installation
7 into existing fruit storage rooms owned by Plaintiff in Yakima
8 County. The purchase, manufacture and installation of such
9 equipment and controllers occurred in 2011.
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12 Certain operational problems with two nitrogen generators
13 developed in early 2012 resulting in their replacement by
14 Defendant in the spring of 2012. However, ongoing disputes
15 between the parties relating to the operation and maintenance
16 of the equipment continued into 2013. Plaintiff eventually
17 removed Defendant's equipment and replaced it with similar
18 equipment manufactured by Storage Control Systems, Inc. ("SCS,
19 Inc."), a competitor of Defendant. SCS, Inc., is also a
20 Michigan corporation. Plaintiff asserts causes of action
21 based upon the following: (1) Breach of UCC Contract; (2)
22 Breach of Express Warranty; (3) Breach of Implied Warranty of
23 Merchantability; (4) Breach of Implied Warranty of Fitness for
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1 a Particular Purpose; (5) Negligence and/or Negligent
2 Misrepresentation; and (6) Violation of the Consumer
3 Protection Act (RCW 19.86).

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5 Defendant seeks a protective order pursuant to FRCP
6 26(b)(2)(C)(iii) and FRCP 26(c)(1)(G) relieving it from
7 producing information related to the design and functioning of
8 controlled atmosphere ("CA") equipment it manufactured and
9 installed at Plaintiff's facility in Yakima County,
10 Washington. Defendant believes that such information,
11 including documents and other related materials, represent
12 confidential trade secrets which should not be discoverable
13 for the reason that they do not relate to the claims asserted
14 by Plaintiff against Defendant. According to Defendant,
15 disclosure of such information, even if subject to a
16 confidentiality agreement, will materially harm Defendant
17 because Plaintiff's expert witness and at least one fact
18 witness are direct competitors of Defendant.
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22 Plaintiff Valicoff Fruit Co., Inc. opposes the motion in
23 part, and has advised that the only documents subject to any
24 current disagreement are the Build Drawing and the Electrical
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1 Schematic (hereinafter, the "disputed requested documents").¹
2 The parties indicate that a protective order was proposed and
3 circulated, but apparently never signed or completed.
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5 **II. DISCUSSION**

6 **A. Disclosure of Trade Secrets to Competitor is Harmful**

7 Defendant argues it has established that the information
8 in the disputed documents contain trade secrets and that
9 disclosure will be harmful to its legitimate business
10 interests. Defendant further explains, citing *In re Worlds of*
11 *Wonder Securities Litigation*, 147 F.R.D. 214, 216 (N.D. Cal.
12 1992), that the burden shifts thereafter requiring the party
13 seeking discovery to establish that disclosure of the trade
14 secrets is relevant and necessary to the action. Defendant
15 asserts that the information found in the disputed requested
16 documents is neither relevant nor necessary to Plaintiff's
17 action against Defendant. Defendant asserts that Plaintiff
18 does not allege negligent design in its complaint and the only
19 "negligence" allegations relate to installation at the
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24 ¹Defendant has conceded that the Assembly Drawing can be
25 disclosed provided a proper protective order is in place.
26 Furthermore, Plaintiff has indicated that disclosure of the
PC Program and PLC Program is not necessary at this time.

1 Valicoff facility and misrepresentation regarding the capacity
2 and capabilities of Defendant's equipment and system.

3 **B. Disclosure Of Sensitive Information And Need For**
4 **Protective Order**

5 Plaintiff argues that Defendant seeks a broad protective
6 order which would not just limit, but prohibit Valicoff's
7 access to information that is necessary to determining a key
8 fact issue in this case: whether or not certain CA equipment,
9 manufactured and sold by Tuff, conformed to the contract
10 between Tuff and Valicoff.
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13 Plaintiff, relying on *Coca-Cola Bottling Co. v. Coca-*
14 *Cola Co.*, 107 F.R.D. 288 (D.Del.1985), asserts that federal
15 courts routinely require the disclosure of confidential
16 information and trade secrets when the information is
17 necessary for a plaintiff to prove an element of its claim.
18 Defendant states that the *Coca-Cola* case is inapposite as it
19 dealt with disclosure to a party who was not in competition
20 with the holder of the trade secret.
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23 Plaintiff asserts that once the party seeking the
24 information has established relevance and necessity, such "...
25 .. discovery is virtually always ordered." *Compaq Computer*
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1 *Corp. v. Packard Bell Electronics, Inc.*, 163 F.R.D. 329, 338
2 (N.D.Cal.1995) (*citing Coca-Cola Bottling Co. v. Coca-Cola*
3 *Co.*, 107 F.R.D. 288, 293 (D.Del.1985)).
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5 Finally, Plaintiff indicates that the parties have already
6 circulated an appropriate stipulated protective order which,
7 if approved, would adequately protect the Defendant's
8 information, and the disclosure of the information within the
9 outlines of the protective order will not lead to the dire
10 consequences the Defendant portends. For these
11 reasons, Plaintiff urges the Court to deny Tuff's motion for
12 a protective order.
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15 **III. Conclusion**

16 The Court has carefully considered the written and oral
17 arguments presented by the parties. The information and
18 documents sought by Plaintiff are commercially sensitive but
19 Plaintiff has demonstrated sufficient need for such
20 information in determining whether the CA equipment provided
21 conformed to the contract. Tuff argues that the expert witness
22 disclosure deadline has passed so Valicoff will not be able to
23 retain an expert to review such commercially sensitive
24 information at this juncture. However, Valicoff has alluded
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1 to the fact that it will seek to extend that deadline based on
2 its inability to review the withheld information.

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4 Unfortunately at this time, the Court has no way of
5 knowing whether the information sought by Plaintiff will have
6 ultimate relevance or otherwise be admissible at trial. What
7 may be a "design defect" in the eyes of one party may also be
8 the reason(s) the product in issue does not conform to the
9 contract which is in dispute. From the limited information
10 presently available, it appears that the disputed requested
11 documents may relate to the understanding of how the equipment
12 in question functions thereby leading to evidence falling
13 within the ambit of FRCP 26. Expert testimony, without review
14 of this information, could arguably be based on mere surmise
15 and pure speculation.
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19 The Court finds that the disputed requested documents may
20 be reviewed by the Plaintiff's expert in the office of defense
21 counsel or at such other location as mutually agreed by the
22 parties or ordered by the Court but shall not be subject to
23 being copied in any format, photocopied or otherwise
24 disseminated. All remaining documents which may contain
25 alleged trade secrets or other confidential information shall
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1 be protected by a protective order negotiated in good faith
2 between the parties or as ordered by the Court in the event
3 agreement is not possible. Accordingly,
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5 **IT IS ORDERED:**

6 1. Defendant's Motion For Protective Order, **ECF No. 17**,
7 is **GRANTED** in part, subject to disclosure of the disputed
8 requested documents as set forth above. Remaining items for
9 which confidentiality is asserted shall be covered by a
10 mutually acceptable protective order which shall be filed and
11 served no later than **December 22, 2014**.
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14 2. If the parties are unable to mutually agree on a
15 protective order, then the parties shall file separate
16 protective orders for the Court's review and adoption no later
17 than **December 22, 2014**.
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19 The District Court Executive is directed to file this
20 Order and provide copies to counsel.
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22 **DATED** this 12th day of December, 2014.
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24 ***s/Lonny R. Suko***

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26 LONNY R. SUKO
SENIOR UNITED STATES DISTRICT JUDGE